No. 85-730

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

HARRY FARKAS,

Petitioner,

against

NEW YORK STATE DEPARTMENT OF HEALTH (headed by David Axelrod, M.D., Commissioner) and NEW YORK STATE DEPARTMENT OF CIVIL SERVICE (headed by Joseph A. F. Valenti, President of the Civil Service Commission),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

BRIEF IN OPPOSITION

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Dated: November 6, 1985

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BRIEF IN OPPOSITION

The Petition

Petitioner, the plaintiff in this action, seeks a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit, entered on May 15, 1985, which affirmed unanimously a judgment and order of the United States District Court, Northern District of New York, dated January 23, 1984, dismissing his complaint after an adverse jury verdict. The order of the Court of Appeals has not been reported.

Issues Presented

1. Whether the petition raises novel and substantial questions of law warranting consideration by this Court.

2. Whether the order of the Court of Appeals is in conflict with prior decisions of this Court or other Courts of Appeals.

Statement of the Case

Petitioner was employed by the New York State Department of Health (hereafter "DOH") from 1958 until his retirement in 1983. In 1963, he was promoted to the position of Associate Sanitary Health Engineer (Radiology) in the Bureau of Radiological Health Services. From 1964 until 1980, he served as section head of the field assistance and x-ray section, one of two or three sections which comprised the bureau at various times. Also during that time he served as interim head of the bureau on occasions when the bureau director, Sherwood Davies, was away from the office.

During his tenure as bureau director, Mr. Davies held the competitive civil service title of Principal Radiological

Health Engineer (Salary Grade 31). Petitioner had also qualified by examination for that title, but since the only budgeted position carried with it the designation as bureau director, he could not receive appointment while Mr. Davies remained in service.

Mr. Davies retired from State service in January 1980. Dr. Karim Rimawi was named acting director of the bureau. Petitioner was then 67 years of age and Dr. Rimawi was 40 years old. *See* Petition, pp 13-14. Nevertheless, Dr. Rimawi held the same civil service grade level as petitioner (SG27), although in a different title (Associate Radiological Health Specialist), and was section head of the other major sections in the bureau.

Dr. Rimawi was a physicist by training, with a doctoral degree and work experience in the field of nuclear radiation. The title of Principal Radiological Health Engineer, on the other hand, required engineering training and licensure as a professional engineer. Consequently, because Dr. Rimawi did not possess the established credentials for the Radiological Health Engineer series, an effort by the Commissioner of Health to appoint him provisionally to the Grade 31 civil service title was disapproved by the Department of Civil Service. Nevertheless, he was duly designated as acting head of the bureau while still occupying his Grade 27 position. Thereafter, the position of Bureau Director was established in the competitive class, in its own right, by Civil Service, and Dr. Rimawi passed the examination for that title.[1] Thus, despite the fact that petitioner calls him "unqualified", Dr. Rimawi was duly appointed bureau director in full compliance with New York Civil Service Law.

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[1]Petitioner also competed in the examination for that title, but failed the oral portion of the test.

Petitioner commenced this action against the Departments of Health and Civil Service, alleging that DOH had discriminated against him for promotion because of his age, and that Civil Service had participated in that action by failing him in the oral test for Bureau Director. On the trial of the action, petitioner was able to establish only that he was qualified for appointment and that a younger man had been appointed instead.

In rebuttal to petitioner's claim, DOH presented testimony to establish that at the time in question, the Department was in the process of a structural reorganization. DOH was seeking to shift its emphasis with regard to environmental radiation so as to address more fully the growing threats of nuclear waste disposal and mishaps in nuclear reactors, as exemplified by the Love Canal and Three Mile Island situations. For that reason, DOH chose to appoint a qualified nuclear physicist rather than a qualified sanitary engineer. Petitioner was unable to demonstrate, to the satisfaction of the jury, that the legitimate business reason advanced by DOH was merely a pretext for discrimination, and a verdict was returned against him.[2]

On appeal to the Court of Appeals, petitioner argued principally that the jury verdict was contrary to the weight of evidence and that the District Court had erred in its charge to the jury in regard to the respective burdens of proof in an age discrimination case. The Court found the verdict to be supported by the evidence (under the "not clearly erroneous" standard), stating that there was nothing in the verdict "to suggest that the jury misapprehended the appropriate legal constraints governing its

[2]At the close of plaintiff's case, the District Court dismissed the action as to the Department of Civil Service, for failure of proof. The Court of Appeals affirmed that order.

determination of the facts". Petr Appendix, p 41. Consequently, the judgment was affirmed.

ARGUMENT

The petition fails to address any of the recognized criteria for granting a writ of certiorari.

No "special and important" reasons, within the meaning of Rule 17 of the Rules of this Court, have been expressed in the present petition for granting a writ of certiorari. Petitioner does not claim that the order of the Court of Appeals is in conflict with prior decisions of this Court, or of another federal court of appeals on the same matter. He has not asserted that a significant constitutional question is at issue or that a matter of substantial public interest is involved. *Cf. Gordon v. New York Stock Exchange,* 422 US 659, 663 (1974). Indeed no such claims could validly be made in this case.

Instead, the main thrust of the petition here is that the jury verdict in the District Court was contrary to the weight of evidence. That same argument was made in the Court of Appeals and rejected by that Court. Specifically, the factual question presented was whether the "legitimate non-discriminatory reasons" advanced by the defendants for not appointing plaintiff were successfully rebutted by him as a mere pretext for discrimination.[3] This is a question, obviously, of the facts and is not of significance to other litigants or the nation as a whole. *Cf. United States v. Johnson,* 268 US 220, 227 (1925). As the Second Circuit found, there was no sufficient reason to disturb the jury's verdict. *Cf. Hagelthorn v. Kennecott Corp.,* 710 F2d 76

[3]*See Texas Dept. of Community Affairs v. Burdine,* 450 US 253 (1981); *McDonnell Douglas Corp. v. Green,* 411 US 792 (1973).

(2d Cir 1983). The ultimate burden of persuading the jury by a preponderance of the evidence that he was discharged for age discriminatory reasons rested at all times on the plaintiff. *Stanojev v. Ebasco Services, Inc.*, 643 F2d 914, 919-920 (2d Cir 1981).

Further, the Court found no reason to believe that the jury had been misled by the District Court's charge as to whether age was a determinative factor in petitioner's discharge. *Cf. E.E.O.C. v. Prudential Federal Savings & Loan Assn.*, 741 F2d 1230 (10th Cir 1984); *Hagelthorn v. Kennecott Corp.*, 710 F2d at 82. Petitioner, for his part, essentially argues that the verdict itself was proof that the jury did not apply the Title VII discriminatory test.

In short, petitioner has failed to show this Court anything more substantial than his own belief that he was discriminated against and a general dissatisfaction with the results below. The same arguments were addressed to the Second Circuit without success and do not afford a basis for this Court's review.

CONCLUSION

The petition should be denied.

Dated: Albany, New York
November 6, 1985

Respectfully submitted,

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